under discussion is that it gives judicial sanction to the right of a man to make a contract, and at his pleasure to break it. If the argument of public policy is to be brought into the discussion at all, it should be invoked not against, but in favor of, the validity of such agreements as we have been considering. To employ the language of Sir George Jessel: "You have this paramount public policy to consider, that you must not lightly interfere with the freedom of contract." From our viewpoint, it is to be hoped that the legislature will interfere for the protection of rights which, while pertaining to corporations, are none the less sacred than those of individuals.

Norfolk, Va. S. S. LAMBETH, JR.

STATE REGULATION OF THE RIGHT OF SUFFRAGE—LIMITS TO POWER OF AMENDING THE FEDERAL CONSTITUTION.*

My Dear Sir: Having given some thought to the original and present legal relations of the Federal and State governments, and to the extent that such relations may lawfully be changed through the process of amending the Federal Constitution, I take the liberty of submitting for your consideration the following suggestions:

The whole Government is declared by the Supreme Court of the United States to be composed of an indestructible union of indestructible States; that while it is legally possible for the States to survive the Union, it is not possible for the Union to survive the States. The indestructibility of the States is fundamental. If this proposition be sound, can the Federal Constitution be so amended as to destroy the States? Article V of the Constitution provides that

"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as a part of this Constitution when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the

* Copy of a letter addressed by its author to the Hon. John Goode, President of the late Virginia Constitutional Convention, to whose courtesy we are indebted for the privilege of its publication—EDITOR VIRGINIA LAW REGISTER.

one or the other mode of ratification may be proposed by the Congress, provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first Article, and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

The word "amend" is alone employed in this provision to measure the changes that may be made in the Federal Constitution. In many constitutions power to "amend, alter or repeal" charters is reserved. This power to alter or repeal is adequate to extinguish a grant utterly. The power to *amend,* however, is not power to *alter or repeal.* It is power to make more perfect or efficient the purpose originally granted. The first amendments of the Constitution of the United States did not disturb the fundamental separation of powers between the State and Federal Governments. The power to amend is a part of the Constitution which is strictly construed. The principle of strict construction, therefore, rests on the power to amend. The power to amend is limited by several considerations. First, the Constitution declares that amendments made shall be a part of *this* Constitution, thereby assuming that the original purpose of the Constitution and its fundamental dogmas should remain unaffected after any amendment made. The power to amend is not power to reconstruct the Government, nor to revolutionize it. It cannot be so amended as to abolish free speech or free religious opinions, nor the right to hold property.

It is held in Bigelow's edition of Story on the Constitution "that the Fourteenth Amendment was not agreed upon for the purpose of enlarging the sphere of power of the General Government, or taking from the State any of its just powers of government, which, in the original adoption of the Constitution were reserved to the States, respectively. The States have given security by this amendment that they will not pervert or abuse their power. The existing division of sovereignty is not disturbed by it." This construction of the Fourteenth Amendment has no basis of support in the power to amend the Federal Constitution. If the Fourteenth Amendment be valid, it is a law operating at once and not suspended to await some abuse of power of the State. If it do not operate as a law within the field of original Federal jurisdiction and in the Federal sphere of power, it is *ultra vires.*

This is made clear by the last part of Article V, limiting the power to amend. That provision declares that "and no State with-

out its consent shall be deprived of its equal suffrage in the Senate." This limitation on the power to amend prevents the destruction of the State. The Federalist, page 423, speaking of this limitation, says, that "it may be remarked that the equal vote allowed to each State is at once a Constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty."

The limitation on the power to amend, above quoted, is a shelter for the domestic sovereignty of the State. It forbids the elimination of any indispensable principle of State sovereignty from the body of powers that make up that sovereignty. Equal suffrage of a State in the Senate cannot be realized unless the State continue in its full character as a State to enjoy that suffrage. Mr. Bigelow, in the quotation above made from his edition of Story on the Constitution (section 1938), assumes that power to amend the Federal Constitution, while it cannot disturb the original division of powers between the State and Federal Government, may be used to set up a jurisdiction within the Federal sphere of power and operated by Federal agency to chastise the State in the event that the State administer its conceded powers contrary to Federal wishes. While he holds that the Fourteenth Amendment does not enlarge the sphere of Federal authority, yet it bestows upon the Federal Government jurisdiction to deny representation in Congress to the State if it be, in Federal opinion, contumacious. As he defines it, it gives the Federal Government power to punish the State for contempt. If the State disregard the limitations set forth in the Fourteenth Amendment on the power to regulate State suffrage, the elections of the State are nevertheless legal, but the State may be punished for not following a Federal rule of procedure which does not operate, as he says, outside of the present sphere of the Federal Government.

The power to punish a State for contempt is a new principle in Constitutional law. The power to punish does not arise until the forbidden act be done. The State whose immortality in the Senate is guaranteed, is not a name merely, but is made up of that body of powers reserved to the States and the people when the Federal Constitution was ordained. Among these powers is exclusive jurisdiction to regulate the suffrage in elections for State officers. There can be no State without the exercise of this power. By virtue of it the State is continued. It is the initial activity of

local self-government. State government includes fundamental rules and maxims, and power to define how those shall be chosen or designated to whom the exercise of sovereign power shall be confided.[1] Webster says that the State Government is not ancillary to the Federal Government. "While considering the relations of the two varieties of Constitutions in the United States, namely, the Union and those of the States, it may well be remarked that although they together form the Constitution of the Union, yet as in their theory their spheres of operation are distinct, so in practice they should be kept disconnected in respect of the rights and duties apportioned to each."

The Constitution of the United States has not conferred the right of suffrage on any one.[2] The United States has no voters in the States of its own creation.[3] No right of suffrage exists till granted.[4]

In the light of the foregoing authorities it is clear that in the beginning of the Federal Constitution its fundamental principle was a division of sovereignty between the State and Federal authority. The powers left in the States are in the aggregate the State. It was this aggregate of powers called the State which was forever to enjoy equal suffrage in the Senate. No diminution of local powers is permissible under the above cited limitations on the power to amend the Federal Constitution. This limitation, as stated by the Federalist, is an instrument to preserve the residuary sovereignty of the State. If under cover of the power to amend, the State may be punished for contempt because of the exercise of its conceded powers according to its own judgment and discretion, then the light of local self-government is turned down very low, and the State made liable to lose its dignity under repeated punishments for contempt for a failure to exercise its reserved powers according to the Federal wish.

Is it not more correct to hold that the State as it entered the Union is always a State, and that there is no process of amending the Federal Constitution which will draw all powers, Federal and State, into a Federal focus, leaving the State as a mere reminiscence? If the life principle of the system be the indestructibility of the Union and the indestructibility of the States, then all amendments to the Constitution should administer to this end, and

[1] Calhoun, Works I, 11; Cooley, Principles of Constitutional Law, 22.
[2] Minor v. Happersett, 21 Wallace, 178. [3] Id. 170. [4] Id. 176.

not be used to cloud the dignity of local self-government in the State by usurping powers belonging to the State and essential to its continuance. This article relates only to the suffrage part of the Fourteenth Amendment.

Very respectfully yours,

JEFFERSON CHANDLER.

Washington, D. C., Oct. 23, 1902.